(18)

No. 90-1029

IN THE

Supreme Court of the United States

OCTOBER TERM, 1991

EASTMAN KODAK COMPANY,

Petitioner,

v.

IMAGE TECHNICAL SERVICE, INC., *et. al,*

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

Brief Of The Amici Curiae Automotive Warehouse Distributors Association, Automotive Body Parts Association, Automotive Engine Rebuilders Association, Auto International Association, Automotive Parts And Accessories Association, Automotive Parts Rebuilders Association, Automotive Service Association, Automotive Service Industries Association, International Mass Retail Association, National Independent Automobile Dealers Association, And Specialty Equipment Market Association As Amici Curiae In Support Of Respondent

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PRELIMINARY STATEMENT

With consent of the parties, the Automotive Warehouse Distributors Association, Automotive Body Parts Association, Automotive Engine Rebuilders Association, Auto International Association, Automotive Parts and Accessories Association, Automotive Parts Rebuilders Association, Automotive Service Association, Automotive Service Industries Association, International Mass Retail Association, National Independent Automobile Dealers Association and Specialty Equipment Market Association (collectively, "independent auto aftermarket associations") submit this brief *amicus curiae*. This

brief will argue for upholding the decision of the United States Court of Appeals for the Ninth Circuit. To do otherwise could establish an erroneous presumption that the existence of inter-brand competition for original sales of durable equipment can by itself be sufficient to discipline prices in service and replacement parts markets from which independent competition has been excluded.

Such a presumption would obliterate the distinctions between the market for new equipment and the distinctly separate markets for replacement parts and service. Without that distinction, the antitrust protection otherwise available for firms in the parts and service markets would be lessened or removed. This brief endorses the discussion contained in the Respondent's Brief on the Merits (Sept., 20 1991).

THE INTEREST OF AMICI CURIAE AND SUMMARY OF ARGUMENT

The associations listed as *amici curiae* on this brief are trade associations whose members do business in the independent automotive aftermarket, including the sale of used vehicles. The combined membership of these associations comprises more than 45,000 firms operating at every level of the automotive aftermarket, including used vehicles sales, parts manufacture, rebuilding, distribution, wholesaling, retailing and vehicle service.

The independent automotive aftermarket is comprised of those firms in the replacement parts and service markets which are not affiliated with the vehicle assembly companies. At present, the independent automotive aftermarket comprises a much larger share of the parts and service markets than does the car company-affiliated sector. More than 90% of the nation's 390,000 retail automotive service establishments are unaffiliated with any of the vehicle assembly companies. At least

seventy five percent of all service and repair work is done by independents in vigorously competitive markets where price and quality are paramount consumer concerns. The independent sector is also the major source for replacement parts, both new and rebuilt, moreover many manufacturers of replacement parts sell both to the car companies and through independent distribution channels. In many instances the same part will be sold in different boxes — one with a car company label, one with an independent label.

Like Kodak, the vehicle assembly firms, do not manufacture the vast majority of the components used in the assembly of their equipment. The vast majority of parts used for equipment assembly and as replacement parts are obtained through outside purchases from parts manufacturing firms.[1] When an equipment assembly firm acts not in its capacity as an equipment assembler but instead as a buyer, distributor, wholesaler and/or retailer of replacement parts, its actions in those markets or distribution levels should be recognized as actions undertaken in markets distinct and separate from the market for new equipment.

The concern of these associations with respect to the issues presented in this case is that a reversal of the decision of the United States Court of Appeals for the Ninth Circuit would encourage vehicle assembly companies to institute tying arrangements whereby control over selected classes of replacement parts would be used to control related but distinct markets for automotive service and parts.

The ready availability of replacement parts is the lifeblood of any service industry. A significant foreclosure of parts availability for the purpose of eliminating competitors in the

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[1] *See*, Petitioner's brief on the Merits at 37-38(Conceding that Kodak obtains many parts from other manufacturers and discussing Respondents' estimate that 90% of Kodak's component parts are obtained from outside firms).

service industry is a cognizable antitrust injury and likely evidence of market power. The elimination of competitive service alternatives also subjects parts suppliers to a form of monopsony in which the tying equipment assembler acting as a replacements parts distributor/reseller becomes the only remaining customer for replacement parts. Lastly, users, sellers and rebuilders of existing equipment would be hostage to parts and service pricing policies of equipment assemblers which would be determined in a non-competitive environment.

It is of particular concern to the independent automotive aftermarket *amici* that the trial court relied on an erroneous and grossly oversimplified economic model of a complex industry analogous in many respects to the automotive industry. This had the effect of concealing the enormous potential for anticompetitive harm in Kodak's parts distribution policy. A presumption that competition in original equipment markets can alone undo anticompetitive injury in parts and service markets is erroneous as a matter of economics. This presumption grants equipment assemblers *carte blanche* to pursue grossly anticompetive objectives when they act in the capacity of parts resellers and service providers.

The record below also suggests that the imposition of this erroneous economic presumption by the trial court was a root cause of the restriction of plaintiff's discovery into issues related to the relationship between the equipment assembler and parts manufacturers with respect to parts sales to independents. This is an indication that reliance on this offending presumption not only distorted the economic analysis of the case but unfairly increased the burden on the plaintiff.

The independent automotive aftermarket *amici* want to make it clear that the history of the automotive industry demonstrates that interbrand competition for vehicle sales has never operated as a check on replacement part prices and cannot be relied upon to do so in vertically monopolized parts and

service channels in the automotive industries or in analogous industries. It is important that the erroneous economic model relied upon by the trial court below not be approved as a substitute for factually based economic analysis.

The relevant experience of the automotive industry can be explained as a function of the economics of durable goods. Any attempt to tie future sales of parts and service to the sale of durable equipment ought to be especially suspect because (1) the purchase of complex, long-lived equipment is invariably made on the basis of criteria other than maintenance costs and thus price increases for maintenance are easily concealed or overwhelmed by other considerations; (2) the elimination of an independent service sector leaves replacements parts manufacturers and rebuilders at the mercy of a single powerful buyer; and, (3) equipment makers have a disincentive to permit the use of existing, older equipment to remain a cost-effective alternative to the purchase of new equipment. Therefore, tying arrangements involving equipment and the replacement parts and service should be found harmful *per se*.

The independent automotive aftermarket *amici* offer in this brief an outline of the economics of the automotive aftermarket in order to illustrate how and why tying arrangements of the kind at issue in this case are inherently harmful. Additionally, these *amici* would like to briefly summarize how the relevant economics of this industry have been reflected in litigation and have influenced the decisions of the Congress with respect to environmental regulation of automobiles.

ARGUMENT

THE EXISTENCE OF INTERBRAND COMPETITION FOR ORIGINAL EQUIPMENT SALES CANNOT PREVENT MONOPOLISTIC PRICING IN SERVICE AND REPLACEMENT PARTS MARKETS WHERE INDEPENDENT COMPETITION HAS BEEN EXCLUDED

The economics of durable equipment is such that consumer decisions concerning long-term maintenance costs are largely severed from the decision processes that govern purchase of the original equipment. This is a function of the time separating the purchases, the disparity in the criteria governing equipment purchases versus those governing purchases of parts and service and the cost of acquiring information. Where parts and service must be obtained in a single monopolized market for both parts and service, there are significant opportunities to extract monopoly profits without any corresponding corrective impact in the market for new equipment.

A. The Economics of Durable Equipment Severs the Impact of Downstream Maintenance Costs on Equipment Sales

A distinctive feature of the economics of durable goods (such as commercial copiers or automobiles) is that the continued availability of existing older equipment reduces the demand for new equipment. *See*, Coase, *Durability and Monopoly*, 15 J. L. Econ. 143 (1972). Before a consumer makes a selection within the market for new equipment he or she must first decide to forgo the purchase or the continued use of an older piece of equipment.[2] In the automobile industry for example, of the more than 175 million cars and trucks currently in use in the United States, more than 70% are at least four years old and more than 40% are nine years or older. Motor Vehicle Manufacturers Association, *MVMA Facts & Figures 1991* at 28. This means that the majority of vehicle owners maintain an out-of-warranty, older piece of equipment rather than purchase a new vehicle. Millions of vehicle owners have purchased their vehicles second or third hand and purchase all parts and service

[2] The availability of used automobiles has a profound impact on the sale of new vehicles. An example of a demand forecasting model incorporating this factor can be found in Winston et al., *Blind Intersection, Policy and the Automobile Industry*, 36-60 (Brookings Institution 1987).

solely from the independent aftermarket. Three-fourths of all automotive aftermarket sales are made through independent service providers.

The economics of durability has a profound impact on the incentive structure of assemblers of durable equipment. If new equipment assemblers began to wage vigorous competition for new equipment sales largely on the basis of product durability in combination with low-maintenance costs they would do so in a shrinking market. They would find that consumer demand was increasingly filled by older pieces of equipment. It is therefore in the collective interest of any equipment industry to move the field of competition away from an emphasis on durability towards an emphasis on innovative features and styling. This lesson is well-applied in the automobile industry where competition takes place in a number of distinct market niches defined entirely by styling issues and equipment base price.[3]

Another aspect of the economics of durability is that the consumer who buys equipment when new may not be the same person who will buy parts and service in later years after the express warranty expires.[4] Style and purchase price are the dominant, if not sole concerns of the original purchaser. When consumers invest time and effort to obtain information prior to a new vehicle purchase, they tend to focus most heavily on obtaining a particular style of vehicle for the lowest possible purchase price. Punj and Staelin, *A Model of Consumer Information Search Behavior for New Automobiles*, 9 J. Consumer Res. 366 (1982). Any awareness of disparities in the cost of

[3] Studies have long shown that consumer preferences are greatly affected by styling changes. *See, e.g.*, Sherman and Hoffer, *Does Automobile Styling Change Pay Off?*, 3 Applied Econ. 153 (1971).

[4] At the time of vehicle purchase, the majority of consumers expect to keep the vehicle for five years or less. *MVMA Facts & Figures 1991* at 46.

maintaining a vehicle may be obliterated by the common misperception that the vehicle will remain free of any defects during the warranty period. *See, e.g., Hearings on Warranties and Guaranties before the House Committee on Interstate and Foreign Commerce*, 91st Cong., 2d Sess. (1970); Federal Trade Commission, *Staff Report on Automobile Warranties*, (1968). Published studies on consumer satisfaction with vehicle performance are usually done on vehicles still within the express warranty period so that accurate consumer data on the likely longer term costs of repair is difficult to obtain. *See, eg.*, Kiley, *Measuring the Full Life of a Car*, 32 Adweek's Marketing Week 57, (March 11, 1991) (discussing benefits of the decision of J.D. Power & Associates to develop longer term surveys of auto consumer satisfaction).

Consumer perceptions in such a market are largely immune to all ~~but~~ the grossest, sustained disparities in long-term maintenance costs. The psychological effects of express warranties, the typical succession of ownership of vehicles, the disparity in intensity of use, the variance in performance within the same vehicle model in successive vehicle years and the difficulty in obtaining accurate future cost information combine to eradicate the effect supercompetitive pricing might otherwise have on new equipment sales. Because consumers are unable or unwilling to focus significantly on repair prices, the car companies have little or no incentive to compete significantly on that basis. *See*, Akerlof, *The Market for 'Lemons': Quality Uncertainty and the Market Mechanism*, 84 Q. J. Econ. 488 (1970).

The studies cited by the independent aftermarket *amici*, *supra*, and the collective experience of their industry flatly contradict the model of consumer behavior offered by Petitioner. *See*, Petitioner's Brief on the Merits at 4, 19-20 (arguing that consumers directly translate any increase in part or service costs into an equivalent increase in equipment price). The complexity of the purchase decision itself, the effect of

express warranties, variations in intensity of use and perceptions of risk[5] all serve to blunt any effect that supercompetitive pricing in monopolized parts and service markets may otherwise have on equipment sales. In order for any market pressures to come to bear on prices for parts and service the true cost of repair would have to be made available in some meaningful way at the time of sale and the evaluation of such information must not be overwhelmed by other considerations.

B. Competition in the Market for Vehicle Sales Cannot Discipline Prices in Vertically Monopolized Markets for Parts and Service

The crux of the economic argument advanced by Petitioner and endorsed in the Brief of the United States as *amicus curiae* is that an increase for prices in service and or parts in an exclusive aftermarket would necessarily entail a proportionate loss of sales or a decrease in the price for equipment sales. Petitioner's Brief on the Merits at 3-4; Brief of the United States at 12-14. Similarly, Petitioner's *amici* Motor Vehicle Manufacturers Association and Association of International Automobile Manufacturers ("MVMA & AIAM") argue that:

> It is unrealistic to suppose that automobile manufacturers could exercise any hypothetical market power by raising prices of replacement parts or service; if they tried to do so, many consumers would perceive it as an increase in the price of new vehicles and the manufacturers would lose sales.

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[5] There are indications that persons with less education and lower income are more risk averse and much more likely to overspend on parts and service where such purchases are offered in the form of extended warranties available at the time of the equipment purchase. *See*, Center for Policy Alternatives, Massachusetts Institute of Technology, *Consumer Durables: Warranties, Service Contracts and Alternatives* (1978); Shimp and Bearden *Warranty and Other Extrinsic Cue Effects on Consumers' Risk Perceptions*, 9 J. Consumer Res. 38 (1982).

Brief of *amicus curiae* Motor Vehicle Manufacturers Association and Association of International Automobile Manufacturers at 5.

This argument about loss of sales presumes that a competing vehicle assembler will intervene and capture a larger market share of new vehicle sales pursuant to any increase in part prices by any one car assembly firm. The hypothetical competitor would supposedly step forward and compete on the basis of lower parts and service prices. However, in order for the hypothetical competitor to compete on this basis with the tying monopolizer of parts and service, it must first forgo its own opportunity to reap supercompetitive prices in similarly tied markets for service and parts for its own equipment. This would certainly be an enormous sacrifice for a distribution monopolist in the automotive industry. Current new car dealer prices for many replacement parts (even *with* competition from independent sources) often run anywhere from 25% to 75% higher than competitive levels. If exclusive control of the markets were established, it is unlikely that the equipment firm would give up certain supercompetitive profits of this (or more likely, greater) magnitude in exchange for future, potential marginal increases in sales in the various distinct, shifting, style-driven markets for equipment sales.

The hypothetical competitor would have to hope that his comparative generosity with respect to parts and service prices over a significant time period will be sufficiently conspicuous to persuade consumers to buy the hypothetical competitor's equipment despite vigorous competition in niche markets overwhelmingly driven by issues of styling, features and equipment base price. If the automotive industry is any guide, the hypothetical competitor of Kodak would quickly relinquish the risky pursuit of the future bird

in the bush and seize his birds in the hand in the form of supercompetitive profits in parts sales and service safe in the knowledge that all of his competitors will do the same.[6]

The tendency for the vehicle assemblers to take the bird in the hand is born out by the ancient struggle between the car companies and their new car dealers over control of the source of replacement parts. This battle has generated a long and instructive litigation history. *E.g.*, *Pick Mfg. Co. v. General Motors Corp.*, 80 F.2d 641 (7th Cir. 1935), *aff'd*, 299 U.S. 3 (1936); *Miller Motors, Inc. v. Ford Motor Company*, 252 F.2d 441 (4th Cir. 1958); *Mozart Co. v. Mercedes-Benz of North America, Inc.*, 833 F.2d 1342 (9th Cir. 1987), *cert. denied*, 488 U.S. 870 (1988); *Metrix Warehouse, Inc. v. Mercedes-Benz of North America, Inc.*, 828 F.2d 1033 (4th Cir. 1986) *cert. denied*, 486 U.S. 1017 (1988); *Grappone, Inc. v. Subaru of New England, Inc.* 858 F.2d 792 (1st Cir. 1982). In each of these cases, a new car dealer sought to enhance his competitiveness in the retail service market by buying lower-priced parts from independent sources only to be opposed by a franchisor vehicle assembler.

Under the theory advanced by Petitioner and endorsed in the Brief submitted by the United States, all of this bitter and expensive struggle over the past fifty years between the car companies and their dealers could have been easily avoided. The car company in each instance could have lowered replacement part prices to a point at or below that offered by independent competitors. This would have driven out the competition and satisfied the wishes of the new car dealers. The ensuing loss of revenue to the vehicle assembler would have been offset by a proportionate increase in new car prices.

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[6] Predictably, Kodak's chief competitor, Xerox embarked on a similar restrictive parts distribution program shortly after Kodak implemented the program now being challenged by Respondents.

Presumably, consumers would have been indifferent to this shifting of costs from parts to equipment price. The fact that this strategy has not been undertaken by any foreign or domestic vehicle company operating in the United States is a strong indication that these markets simply do not, and never have functioned in the manner outlined by Petitioner and its *amici*.

It is instructive to compare the actual behavior of vehicle and copier assemblers to the idealized competitive situation outlined by the Petitioner, *e.g.*: "a competitive supplier selling at the prevailing price and attempting to impose a tie-in upon a buyer, would merely be displaced by a seller who did not." Petitioner's Brief on the Merits at 19 (quoting Bowman, *Tying Arrangements and the Leverage Problem*, 67 Yale L.J. 19, 20 (1957)). In reality, the competing equipment assemblers are far more likely to follow suit than compete in either market for all of the reasons discussed in this section and the previous one. The model relied upon by Petitioner may indeed be serviceable when the corner grocer ties flour to sugar but it has little or no applicability in the markets in which Petitioner actually operates.

What is missing from the Petitioner's analysis is the fact that lower prices for replacement parts and service also has the effect of extending the life and value of older equipment. If some of the demand for equipment is being filled by used equipment, then the demand for new equipment is reduced. Control over the cost and availability of all aspects of maintenance permits the equipment maker (rather than the consumer and the market) to set the value and life span of older equipment.

It is also noteworthy that the trial court apparently presumed that the economic life of the tying equipment is immutable and not affected by the pricing of parts and service. *Image Technical Services, Inc. v. Eastman Kodak Co.*, No. C-87-18-WWS at 3 (N.D. Cal. April 18, 1988)(WESTLAW 1988 WL 15332)(Memorandum of Opinion and Order Granting

Summary Judgment) ("customers who have purchased Kodak equipment in a competitive market will tend to retain that equipment for its economic life.") However, the life of that equipment will be largely dictated by the cost and availability of parts and service. Where an assembler of durable equipment gains control of parts and service, and therefore of equipment life span, an equipment sale functions more like a lease of arbitrary duration in which the lessee assumes all risks. This is market power, indeed.

C. The Injury Which Would Result from the Removal of Independent Competition in the Parts and Service Markets Would be Sufficiently Significant to Warrant a *Per Se* Application of the Antitrust Laws

Given the complex economics of durable equipment and their maintenance, it is unreasonable to argue that competition in the sale of equipment can restrain prices in monopolized markets. The elimination of lower-priced independent competitors alone virtually guarantees such an increase. A remaining issue is whether the potential increases will be of sufficient significance to warrant *per se* application of the antitrust laws. The independent auto aftermarket *amici* argue that such application is warranted and necessary.

Even the example cited by Petitioner illustrates the potential for harm in such tying arrangements. Petitioner endorses Judge Posner's dissenting opinion in the *Parts & Electric* case. Petitioner's Brief on the Merits at 20-21, 26(citing *Parts & Electric Motors, Inc. v. Sterling Electric, Inc.*, 866 F.2d 228 (7th Cir. 1988), *cert. denied*, 110 S.Ct. 141 (1989). In dissent, Judge Posner wrote:

> Sterling could in principle exploit its "monopoly" by setting its price for replacement parts just below the point at which owners of Sterling motors would decide to scrap the

> motors rather than pay exorbitant prices for the parts necessary to keep them in service. But this would be a short-run game, since as soon as word got out no one would buy Sterling motors.

Id. at 236.

This analysis would be valid if Sterling had only two options—setting part prices at competitive levels or setting prices at conspicuously ruinous, extortionate levels. Under those circumstances, there would be a foreseeable impact in the market for new equipment. In actual practice, however, there is a lot of room in between those two decision points and every point in between represents supercompetitive, monopoly profit. The fact that there is an upper limit as to how much can be extracted is not a demonstration that allocative efficiency has been enhanced or that competition is alive and well. Nor does the presumed existence of an ultimate ceiling on the rate of overcharge for parts justify the additional assumption that there would also be proportionate corrections for overpricing done on a smaller scale. For the reasons discussed at length *supra*, this additional assumption is invalid.

In practice, Judge Posner's example is reducible to a situation in which the tying equipment assembler does have significant market power and can charge significantly higher prices in the tied markets. The only check on such prices is that they must be less than the amount required to force the consumer to scrap his equipment altogether. The functional difference between this limitation and outright monopoly power is difficult to discern. The power to impose significantly higher prices itself suggests the existence of market power irrespective of tying equipment market share. *See*, Pitofsky, *New Definitions of Relevant Market and the Assault on Antitrust*, 90 Colum. L.Rev. 1805, 1847

(1990)(arguing that high profit levels are *per se* indications of market power).

The program instituted by Kodak would allow Kodak to keep prices for new equipment at current levels while shifting the burdens of uncertainty, market risk, and the cost of acquiring information onto the consumer in the form of higher prices for parts and service. Additionally, Kodak can also be assured from the evidence of analogous industrial history that instead of competitive pressure there will be emulation by, not competition from, other equipment assemblers.

The assumption that replacement parts and service prices are passively integrated into the perceived price of equipment sales is not only erroneous but serves to conceal broad opportunities to constrict consumer welfare and destroy competition in distinct markets. A tying arrangement involving (1) equipment and (2) the means to maintain that equipment over time would grant to the tying seller a range of anticompetitive opportunities not otherwise available where parts and service markets are competitive.

Under a program of exclusive control of parts and service by an equipment manufacturer, price discrimination against older machines or particular classes of equipment would become possible by means of selective increases in part prices. The tying seller would be able to remove less profitable classes of machines from continued use altogether when it suited his purposes. Costs could also be shifted away from favored users onto others. Obsolescence in original equipment could be prematurely ordained and exploited. Instead of allocative efficiencies arising from competition in both the equipment sales market and in the parts and service markets, the equipment maker could dictate both the uses and intensities of use of its equipment. It is untenable to maintain that this kind of situation is the functional equivalent of distinct, competitive markets for new equipment, used equipment, parts and service.

Nor is it reasonable to claim that such sweeping economic power could be justified as merely another means of promoting interbrand competition. It is implausible that consumer dissatisfaction with inferior (independent) service would redound to the detriment of the equipment assembler as Petitioner claims. Petitioner's Brief on the Merits at 7(arguing that Kodak, in its capacity as an assembler of new equipment, would be blamed for deficient service performed by an ISO.) Unlike monopoly pricing of parts and service in exclusive markets, the cost and consequence of poor service are quickly discovered. It is far more likely that consumers will seek out a new service provider rather than simply nurture a grudge against the equipment maker for the remaining life of the equipment. The very fact that a consumer sought out and contracted with an independent service provider in the first place demonstrates that the consumer was aware of the option to deal with a new service provider. If anything, the independent service provider is under *more* pressure to establish a reputation for quality and low price than is an equipment company-affiliated service provider who may benefit from a presumption of expertise.

As for Petitioner's claim that exclusion of service competition is justified by the necessity to reduce inventory costs, the independent automotive aftermarket *amici* merely wish to point out that there is evidence in the record that the Respondents did attempt to establish independent channels of replacement parts distribution. Joint Appendix 429, 468, 496. If Kodak did in fact attempt to block the development of an arrangement that would certainly have lifted the alleged burden of additional inventory costs, then the claim is without merit.

The validity of Petitioner's claim that the Independent Service Organizations were "free riding" ought to be examined in light of the fact that Kodak, like a vehicle assembler, does not make the vast majority of component parts used in the assembly of its equipment. The investment made by the actual parts

manufacturer in both the design and the efficiency of the manufacturing process for component parts is at least as great as that made by the equipment assembler. Kodak can recoup its investment through the sale of new equipment, but the parts manufacturer may require access to the replacement parts market in order to recoup its investment. *See, e.g.* Zelenitz, *Below-Cost Original Equipment Sales as a Promotional Means*, 59 Rev. Econ. Stat. 438 (1977)(discussing pricing strategies of automobile component manufacturers and methods of estimating future replacement parts demand). However, if the equipment manufacturer is the only buyer in the replacement parts market by virtue of elimination of all other service providers, then the interests of the actual parts manufacturer will be hostage to the intentions of the equipment assembly firm.

For all of the reasons discussed *supra*, the tying of parts and service to the sale of new pieces of durable equipment merits *per se* application of antitrust law. The potential for harm is inherently substantial.

D. In the Clean Air Act Congress Expressly Recognized the Nature of the Anticompetitive Injury Inherent in the Exclusion of Independent Automobile Parts and Service Providers

A further example of the nature of the economics of the automotive aftermarket can be found in the legislative history of those provisions of the Clean Air Act dealing with automobile emissions. Legislation creating long-term warranty and emissions performance obligations for vehicle assemblers could have had the unintended effect of bringing vehicle owners into a compulsory service customer relationship with the car companies. From the enactment of the Clean Act Act in 1970, the independent automotive aftermarket consistently and unanimously opposed broad, long-term, mandated emissions warranties on vehicle exhaust systems on the grounds that such warranties would cause a large volume of "drag along" repair work to be shifted away from more

competitive independent service providers. *See, Monopolistic Tendencies of Auto Emission Warranty Provisions: Hearings Before the Subcommittee on Environmental Problems Affecting Small Business of the Permanent Select Subcommittee on Small Business, House of Representatives*, 93rd Cong. 2d. Sess. (1974).

Congress responded in a highly detailed manner to the potential problems created by the warranties mandated by the Clean Air Act . The carefully enumerated delineation of major emissions components and other emissions-related auto parts in both the 1977 and 1990 amendments to the Clean Air Act were due solely to Congress' concerns about the anticompetitive effects of a statutorily mandated warranty relationship between consumers and the car companies. Sections 203 and 207 of the Act as amended in 1977 also prohibited any vehicle assembler from requiring the use of name brand parts when replacing emissions-critical parts. 42 U.S.C.A. §§ 7522, 7541(1983).

Congress also established a requirement in the 1990 amendments to the Clean Air Act that motor vehicles be equipped with electronic diagnostic devices. Again, solely in deference to the potential for anticompetitive injury, Congress mandated that these devices be standardized with respect to connecting fittings for diagnostic equipment in service shops and also banned proprietary encryption of stored diagnostic data. *See, eg.*, 136 Cong. Rec. S3271 (daily ed. March 27, 1990) (statement of Sen. Gore)(the open diagnostics provisions are "an effort to make certain that we do not inadvertently curtail a vehicle owner's right to choose where he or she pays to have their car or truck repaired, nor thwart competition in the repair industry"). Had Congress not made such provisions, vehicle makers could have taken exclusive control of virtually all future engine (and other) repairs simply by refusing to disclose electronic codes.

In all of these actions, Congress clearly recognized a potential for anticompetitive abuse that could not have been corrected by interbrand competition for vehicle sales.

Conclusion

The unique economics of durable goods makes tying arrangements in the markets for parts and service inherently suspect. Competition for new durable equipment sales cannot discipline prices in a tied market for sales and service. Comparative market shares in the tying equipment market are not a reliable indicator of the potential for significant harm in the tied markets for parts and service. No antitrust litigation should ever be decided on the basis of economic presumptions or models that contradict demonstrable economic realities clearly evident in analogous industrial history. The decision of the United States Court of Appeals for the Ninth Circuit should be upheld.

Respectfully submitted,

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